93-918

Supreme Court, U.S.
FILED
DEC 10 1993
OFFICE OF THE CLERK

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA, *et al.*, THE BLACK UNITED FRONT, *and* THE WASHINGTON AREA CONSTRUCTION INDUSTRY TASK FORCE,

Petitioners,

v.

THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, D.C. TRANSIT SYSTEM, INC., LEONARD N. BEBCHICK, HAROLD GORDON, COOTER & GELL, WEIL, GOTSHAL & MANGES, CADWALADER, WICKERSHAM & TAFT, SECURITY TRUST COMPANY, N.A., *and* THE GOVERNMENT OF THE DISTRICT OF COLUMBIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition for certiorari is addressed to the propriety of the D.C. Circuit's administration of the Washington Metropolitan Area Riders' Fund which consists entirely of assets recovered under these petitioners' agreement with D.C. Transit System, Inc. settling bus fare overcharge litigation begun in 1967.[1]

The questions presented concern attorneys' fee awards to counsel selected by the Court to represent the escrow agent/depository under the settlement agreement in advance of any recovery traceable to their efforts. More particularly, the questions are:

1. Whether such fee awards are based on an unwarranted extension of that exception to the American Rule which allows a court to award fees and expenses to the prevailing party from a fund recovered through his efforts that benefit a class.

2. Whether a new exception to that rule, and the avoidance of an explicit provision prohibiting addi-

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[1] Published opinions in this litigation include: *Democratic Central Committee of the District of Columbia, et al. v. Washington Metropolitan Area Transit Commission (DCC I)*, 158 U.S. App. D.C. 7, 485 F.2d 786 (1973), *cert. denied*, 415 U.S. 935 (1974); *Democratic Central Committee of the District of Columbia, et al. v. Washington Metropolitan Area Transit Commission (DCC II)*, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973), *cert denied*, 415 U.S. 935 (1974); *Democratic Central Committee of the District of Columbia, et al. v. Washington Metropolitan Area Transit Commission (DCC III)*, 268 U.S. App. D.C. 406, 842 F.2d 402 (1988), *cert. denied*, 488 U.S. 1043 (1989); *Democratic Central Committee of the District of Columbia, et al. v. Washington Metropolitan Area Transit Commission*, 291 U.S. App. D.C. 300, 941 F.2d 1217, (1991); *Democratic Central Committee of the District of Columbia, et al. v. Washington Metropolitan Area Transit Commission*, ___ U.S. App. D.C. ___, 988 F.2d 1239 (1993).

tional attorneys' fees in a settlement agreement, may be found in the employment of the device of an escrow agent/depository of settlement proceeds.

3. Whether the award of fees to counsel selected by the court without notice to petitioners, and/or based upon *ex parte* communications, while taking them away from counsel selected by petitioners, represents such a systematic violation of Fifth Amendment Rights and departures from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Rule 10.1(a).

The names of petitioners not listed in the caption are set forth as footnote 2 to the prayer of this petition, *infra*, p.1.

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Petitioners,

v.

THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, D.C. TRANSIT SYSTEM, INC., LEONARD N. BEBCHICK, HAROLD GORDON, COOTER & GELL, WEIL, GOTSHAL & MANGES, CADWALADER, WICKERSHAM & TAFT, SECURITY TRUST COMPANY, N.A., *and* THE GOVERNMENT OF THE DISTRICT OF COLUMBIA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Democratic Central Committee of the District of Columbia, *et al.* (hereinafter "DCC"),[2] The Black United Front and the Washington Area Construction Industry Task Force (together "BUF") pray that the Court grant a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in the above captioned litigation May 13, 1993 and June 28, 1993 (App. 1a, 5a, 19a, 21a & 40a).

CITATIONS TO OPINIONS BELOW

The memorandum opinion accompanying these orders is setout at App. 5a. It has not yet been published in the National Reporter System.

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[2] The present name of the "Democratic Central Committee of the District of Columbia," is "The Democratic State Committee of the District of Columbia", an affiliate of the National Democratic Party. The old name has been retained for the sake of continuity.

Also included as parties under the "*et al.*" designation in the caption and throughout the body of this petition as "DCC" are the other petitioners in this litigation who, in addition to the lead petitioner, Democratic Central Committee, are signatory and releasing parties to the settlement agreement namely: Tilford E. Dudley (by Rick Dudley, personal representative), Bruce Terris, The Emergency Committee on the Transportation Crisis, Sammie A. Abbott (by Ruth Abbott, personal representative), The Metropolitan Citizens Advisory Council, Thomas E. Payne, Lawrence Aaronson, Marion Barry, Jr., Linwood D. Chatman, Margaret M. Clarke, Matthew K. Clarke, Joseph Gipson, Lillian Green, Willie J. Hardy, Dorothy Harrison, Hubert W. Leckie, Lester McKinnie, Mrs. Robert Nash (by Robert Nash, personal representative), Barnard W. Prior (by Wzonni Colston, personal representative), Mary Ray, Frank Speltz, George E. Storey, Chauncey Thomas, William A. Wendt, Johnie Wilson, Clarence Wolrich, Maria Worris and Mrs. Phillip Young.

September 21, 1993, after denying petitions for rehearing on the orders of May 13, 1993 and June 28, 1993 (App. 1a, 5a, 19a, 21a & 40a), the court below published a related opinion in this case relevant to these rulings (App. 24a). That opinion has not yet been published in the National Reporter System.

JURISDICTION

(1) The judgments sought to be reviewed were dated and entered May 13, 1993 and June 28, 1993 (App. 1a, 5a, 19a, 21a & 40a).

(2) Rehearings on said judgments were denied July 1, 1993 and August 13, 1993 (App. 42a, 44a, 46a & 48a). On September 23, 1993 petitioners' time to petition for certiorari in this Court was extended by order of the Chief Justice to and including December 11, 1993.

(3) The statutory provision believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On February 26, 1990 the court below entered an order approving the January 26, 1990 settlement agreement negotiated by petitioners with D.C. Transit[3] and, pursuant to the terms thereof, established the Washington Metropolitan Area Riders'

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[3] The litigation is further identified in fn. 1 to "Questions Presented" *supra*, p. iii

Fund and an "escrow agent/depository account" with Security Trust Company, N.A.[4]

D.C. Transit defaulted on its initial obligation under the settlement agreement to make a $4.7 million cash payment into the Riders' Fund on May 29, 1990. After motions to issue a writ in aid of execution, the Court below entered orders, by agreement of the parties, dated July 2, 1990 and September 11, 1990 whereby D.C. Transit's initial $4.7 million cash payment due May 29, 1990 was replaced by a $4.7 million interest bearing note due July 14, 1992. This was the due date of another (and additional) interest bearing note to the Riders' Fund in the face amount of $4.5 million. Further security was provided by a deed of trust on Transit's "Georgetown Lots" and collateralized by the "Navy Yard Note," a purchase money mortgage note acquired by Transit from sale of that property.

Counsel to petitioners, Messrs. Dowdey and Hahn, thereafter applied for payment by D.C. Transit of their fees and expenses for renegotiating the settlement agreement. The Court denied their motion by order dated March 12, 1991 (App. 50a), pointing out that under paragraph 5.4 of the settlement agreement attorneys fees in addition to those previously approved by the Court and specified in both the settlement and escrow agreements were allowed only "upon

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[4] Except as otherwise indicated, the facts presented here summarize those set forth in the lower court's related slip opinion of September 21, 1993 reducing the fees of counsel who litigated these cases and negotiated the settlement (App. 24a). Although the September 21, 1993 decision is not here sought to be reviewed (a motion for rehearing thereon is still pending) its content and rationale are relevant to the instant petition for certiorari.

a successful action being brought to enforce the Compromise Agreement".[5] (App. 52a)

D.C. Transit defaulted on its total $9.2 million settlement obligation when both of its notes to the Riders' Fund became due on July 14, 1992.

After sale of the Navy Yard Note in February of 1993, the Riders' Fund had cash on hand of approximately $5.6 million.[6] Motions are pending to distribute these funds and establish an appropriate use beneficial to the farepayers.[7]

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[5] Not mentioned in the September 21, 1993 slip opinion. *Democratic Central Committee of the District of Columbia, et al. v. Washington Metropolitan Area Transit Commission*, ___ U.S. App. D.C. ___, ___ F.2d ___, decided September 21, 1993. (App. 24a)

[6] On July 30, 1993 the lower court entered judgment "against D.C. Transit System, Inc. in favor of Security Trust Company, N.A. acting as Escrow Agent/Depository for the account of the Washington Metropolitan Area Rides' Fund . . . in the amount of $4,976,124.79, representing as of February 2, 1993" the balance of interest and principal due on both of Transit's notes. Attorneys' fees were to be determined later. *Democratic Central Committee of the District of Columbia, et. al. v. Washington Metropolitan Area Transit Commission*, ___ U.S. App. D.C. ___, 988 F.2d 1239 (1993). No part of said judgment has yet been paid.

[7] Before default DCC and BUF obtained an order in the lower court on June 5, 1992 directing "that O. Roy Chalk and Claire Chalk . . . prepare, sign and file with the Recorder of Deeds . . . and with the Court, the documents necessary to comply with the representation made in open court by their counsel, Mr. Harvey M. Spear, that they would subordinate to the claims of the Riders' Fund any and all liens filed after July 2, 1990 they may have or claim upon the Car Barn Property, 3600 M Street, Northwest, Washington, D.C., which Mr. Spear represented as totalling $1,835,112.00, and upon the Brookland Garage, 900 Michigan Avenue, Northeast, Washington, D.C., which Mr. Spear

Provisions for attorneys' fees in settlement agreement

Under paragraph 3.1 of the Compromise Agreement, out of the first $4.7 million paid into the Riders' Fund, Mr. Dowdey was to receive $500,000 plus his expenses and Mr. Hahn $500,000 plus his expenses. When final payment was made on the remaining $4.5 million note, Messrs, Dowdey and Hahn were to receive the balance of their fees, $500,000 each. In the meantime, each was to receive 11.11% of the interest payments on the $4.5 million note and, by the order of September 11, 1991, on the $4.7 million note also. Interest payments to Messrs. Hahn and Dowdey were thus intended to compensate them for the then expected two year delay in receiving final payment of their fees. These fees were fixed by the Court in its order of August 9, 1989.

Paragraph 3.1(c) of the Compromise Agreement provides, "No other attorneys' fees or expenses will be paid or payable to any of the parties hereto out of the fund provided by the Compromise Agreement."

However, the lower court's order and memorandum of March 12, 1991 (App. 50a), noted above, points out that additional attorneys' fees may be awarded against "the losing party" in a successful action being

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represented as totalling $937,215.00"

DCC and BUF's remaining claims of self dealing were dismissed without prejudice.

The Chalks filed such subordination agreements, and in an opinion dated March 30, 1993 the lower court denied the Chalks' efforts to reform such agreements. *Democratic Central Committee of the District of Columbia, et. al. v. Washington Metropolitan Area Transit Commission*, ___ U.S. App. D.C. ___, 988 F.2d 1235 (1993).

brought to enforce the Compromise Agreement" under paragraph 5.4 thereof.

Furthermore, both the $4.7 million and the $4.5 million notes of D.C. Transit and the deeds of trust securing them provide for collection costs including reasonable attorneys' fees.[8]

Court employment of counsel for escrow agent and directions to pay their fees from Riders' Fund.

Neither the settlement agreement nor the escrow agreement authorize the employment of counsel for the escrow agent at the expense of the Riders' Fund. Indeed, the escrow agreement does not authorize the disbursement of attorneys' fees—or any other actions —except as there stated or at the express direction of the court.[9]

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[8] See text of notes set out in *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission, supra,* note 5.

[9] This and what follows are not mentioned in the September 21, 1993 slip opinion. The lower court asserts in the first sentence of its memorandum of June 28, 1993 (App. 5a), "one of the responsibilities of the Security Trust Company, N.A. ("Trust Company") as Escrow Agent/Depository for the Washington Metropolitan Area Riders' Fund ("Riders' Fund"), is to protect and enhance the value of Fund assets." But this general fiduciary responsibility of agents does not make the escrow agent a trustee such as other individuals named in the deeds of trust securing the notes who are charged in those instruments with a variety of discretionary duties respecting the sale of the properties securing the notes and other matters. Cf., as to the limited litigation authority of an agent as contrasted with a trustee, *Heiskell v. Mozie*, 65 App. D.C. 255, 257, 82 F.2d 861, 863 (D.C. Cir. 1936); 6a Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1548 (1990).

The appointment of an escrow agent with very limited powers[10] was deliberately chosen by the parties to this litigation as a more economical means of collecting and disbursing funds than the alternative of naming respondent, The Washington Metropolitan Area Transit Commission, administrator of the Riders' Fund as set out in earlier settlement proposals. The occasion for this change is found in the September 18, 1989 filing of the Commission complaining about the responsibility with which it was being "saddled" without any provision for payment of unspecified future costs and expenses of administration. To avoid "saddling" farepayers with unspecified future expenses, the settlement agreement, as finally approved, provided that the Court should designate an escrow agent depository with modest fixed percentage fees for services similar to those which might otherwise be performed by the clerk of a court.[11]

It had been thought, until recently, that the note provisions for recovery of collection costs, including

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[10] Examples of the lack of any independent authority in the escrow agent may be found in recent orders of September 8, 1993 to pay real estate taxes and October 19, 1993 to pay recordation fees, taxes and a redemption fee. Many similar administrative orders preceded these.

[11] This device is similar to that authorized by Fed. R. Civ. P. 67 as an alternative to an ordinary deposit with the Clerk of the Court and discussed in *LTV Corporation v. Gulf States Steel, Inc. of Alabama*, 297 U.S. App. D.C. 50, 62, 969 F.2d 1050, 1062 (1992), *cert. denied sub nom. Gulf States Steel, Inc. of Alabama v. LTV Corporation*, ___ U.S. ___, 113 S. Ct. 661 (1993). "The Clerk's authority to dispose of assets in its registry is dictated by the court it serves." *Landau v. Vallen*, 895 F.2d 888, 896 (2d Cir. 1990).

attorneys' fees,[12], together with paragraph 5.4 of the Compromise Agreement, furnished the authority for the lower court's order of July 9, 1992 approving the escrow agent's employment of Leonard Bebchick "to represent the interests of the Riders' Fund as counsel at an hourly rate of $250.00" (App. 55a). Mr. Bebchick's hourly charges for legal services would be payable, therefore, only to the extent that they represent collection costs recovered from D.C. Transit. The court's order of May 13, 1993 (App. 1a) directing payment of $15,681.84 in attorney's fees out of the Riders' Fund to the law firm of Cooter & Gell was likewise explainable as an advance on the trustees - not the escrow agent's foreclosure expenses.

But this order was entered without prior notice to petitioners' counsel and appears *prima facie* to have been based on an *ex parte* communication to the Court (App. 1a). A subsequent May 26, 1993 order (App. 57a) revealed another *ex parte* communication concerning fee negotiations with Harold Gordon. These two *ex parte* orders raised questions about Mr. Bebchick's initial July 9, 1992 appointment as counsel to the escrow agent (App. 55a). How did it come about that the Trust Company's letter of July 6, 1992 requesting approval of Messrs. Hahn and Dowdey as its counsel (App. 53a) became only three days later on July 9, 1992 an order approving the employment of Mr. Bebchick (App. 55a)? Why did the stated reasons for retaining Messrs. Hahn and Dowdey seem so unpersuasive only three days later? Did the Court have further discussions with Trust Company officer Mr. Frederick W. Clark or Mr. Bebchick or anyone else?

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[12] *See* judgment and opinion, note 6, *supra*

Petitioners moved for rehearing and for rehearing en banc, citing *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988)(Absence of "notice at a meaningful time and in a meaningful manner" is "contrary to the most basic tenets of due process." An order or judgment so entered is a nullity.) Petitioners also suggested that they and their clients, the farepayer beneficiaries of the Riders' Fund, were entitled to a disclosure and explanation of any and all *ex parte* communications with the Court respecting the employment of counsel for the escrow agent and the payment of their fees.[13]

On July 1, 1993 the panel denied rehearing without explanation or opinion and, on the same day, an order was entered denying rehearing en banc, no member of the Court having requested a vote thereon.

While the petition for rehearing and suggestion of a rehearing en banc were pending, the Court entered their orders on June 28, 1993 directing payment of an additional $271,000 in attorneys' fees out of the Riders' Fund to counsel for the escrow agent; $144,000 to Leonard Bebchick, $100,000 as a retainer

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[13] *See* Rule 1(b) of the *Rules of the Judicial Conference for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability* (Appx. III to Local Rules of this Court); *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 57 (1977); *ABA Model Code of Judicial Conduct* Canon 3 B(7) adopted by the American Bar Association August 1990 (ABA/BNA); *D.C. Rules of Professional Conduct* adopted by the District of Columbia Court of Appeals March 1, 1990, Rule 3.5, "Impartiality and Decorum of the Tribunal," requiring lawyers to refrain from *ex parte* communications specified in the *ABA Model Code of Judicial* Conduct with which they are bound to familiarize themselves.

to Harold Gordon, and $27,066.34 to Weil, Gotshal and Manges.

These orders made clear for the first time that the prohibitions in the settlement agreement against additional attorneys' fees (except such as might be recovered from Transit in an enforcement action), were not being recognized by the court.

Furthermore, it appeared that $271,000 was taken from petitioners and the class they represent and given to lawyers for services which thus far had yielded nothing but the formal entry of an uncollected judgment.

A $100,000 retainer was authorized to enhance the value of a piece of property acquired at foreclosure. A successful suit to accomplish this might present a common fund case; but unlike other common fund cases, a fee is being paid in advance of any recovery, even before suit had even been commenced.

Petitions for rehearing and rehearing en banc raising these issues and suggesting confiscation and denial of procedural and substantive due process under the Fifth Amendment were denied without opinion. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Heretofore attorneys fees in a common fund case were payable only to "successful litigants." *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 (1975).

Here, no new assets have been recovered for the Riders' Fund by the efforts of any of the numerous lawyers appointed by the court for the escrow agent.

All legitimate legal services thus far have been in aid of enforcement of the settlement agreement for which fees are recoverable only against Transit under paragraph 5.4 or fee shifting covenants in Transit's promissory notes.

Because the "Georgetown Lots" are now owned by the Fund as a result of the foreclosure sale (for which Transit's indebtedness was reduced by the amount of the bid), litigation to develop them may lead to a realization of something over and above present Fund assets. In such event, but not before, a new "common fund" may be created and fees may be payable out of that new common fund. But not in advance. A retainer for a common fund yet to be created is unknown.

The "escrow agent/depository" device will not justify an evasion of the American Rule or the settlement agreement's strict prohibition against additional attorneys' fees. Like the Federal Rules of Civil Procedure, the All Writs Act 28 U.S.C. § 1651 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1988). Thus, as recently stated in *LTV Corporation v. Gulf States Steel, Inc. of Alabama*, 297 U.S. App. D.C. 50, 62, 969 F.2d 1050, 1062 (1992), *cert. denied sub nom. Gulf States Steel, Inc. of Alabama v. LTV Corporation*, ___ U.S. ___ , 113 S. Ct. 661 (1993), "Rule 67 procedure [similar to the escrow arrangement here involved] provides a place of safekeeping for disputed funds pending the resolution of the legal dispute, but it cannot be used as a means of altering the contractual relationships and legal duties of the parties." 297 U.S. App. D.C. 63, 969 F.2d 1063.

Certainly no excuse for judicial intervention can be found in the circumstances of this case. Counsel for petitioners have been and remain available to serve as counsel to the escrow agent—as originally proposed by the escrow agent, (App. 53a) subject to all the terms and restrictions imposed by the settlement agreement on payment of their fees.

The present case illustrates the hazards of judicial intervention. It shows the repeated entry of orders directing the payment of substantial fees to counsel selected by the court based on *ex parte* communications, without notice to the parties or their counsel. Favoritism, whether intended or not[14] may be seen in the unequal treatment of counsel chosen by petitioners and counsel chosen by the court.

The issues thus involve not only a remaking of the parties' agreement under the guise of administering it, but the systematic violation of Fifth Amendment rights and departures from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision under Rule 10.1(a).

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[14] As stated in a different context, "Consciously or not, many judges are looking for, as the labor cases put it, a 'sweetheart' lawyer. . . . Even the most conscientious judge will feel the weight of his overloaded calendar, and this concern will be evident to the perceptive lawyer. When . . . counsel's earnings flow from the pen of the . . . judge, the principle of independent advocacy that is essential to the administration of the adversary system of justice is undermined." David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1, 15-16 (1973).

CONCLUSION

The court should grant a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in the above captioned cause on litigation May 13, 1993 and June 28, 1993.

Respectfully submitted,

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**Counsel of Record*

APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed May 13, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

It is

ORDERED, by the court, that the Security Trust Company is authorized to pay Cooter & Gell from the Washington Metropolitan Area Riders' Fund the sum of $15,681.84 in satisfaction of the attached statement for legal services rendered and the sum of $1316.25 for legal services rendered in the month of February.

Per Curiam
For the Court:

Ron Garvin, Clerk

LAW OFFICES
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May 3, 1993

Washington Area Riders' Fund
c/o Leonard N. Bebchick, Esquire
888 16th Street, N.W., Suite 600
Washington, D.C. 20036

RE: *Cabin John Right-of-Way*

For Professional Services Rendered for the Period April 1 through April 30, 1993.

Date	Time	Attorney	Description
04/01/93	2.50	DAC	Meeting with L. Bebchick and conference with J. Cahill.
04/01/93	.25	JMC	Phone call with L. Bebchick re sale date.
04/02/93	.50	WMH	Conference with D. Cooter and J. Cahill regarding foreclosure issues.
04/02/93	2.00	JMC	Meeting with D.C. Assistant Recorder of Deeds; phone call with L. Bebchick.
04/02/93	1.00	JMC	Phone call with title company; obtain tax information and title record; review draft advertisement.
04/05/93	.25	DAC	Conference with W. Harvey and J. Cahill.
04/05/93	.25	DAC	Phone calls with L. Bebchick and F. DiCello.

04/06/93 .25 DAC Phone call with F. DiCello.

[Plus 11 pages of further detail but no indication of distribution to anyone other than Mr. Bebchick.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed June 28, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

Upon consideration of the Motion by the Security Trust Company, N.A. ("Trust Company"), as Escrow Agent/Depositary for the Riders' Fund requesting the Court to Approve the Appointment of Mr. Harold Gordon, Esquire, of the District of Columbia Bar as Special Counsel to assist the Trust Company in its efforts to realize the maximum return for the Riders' Fund by enhancing the value and

by disposing, or otherwise, of two parcels of vacant, unimproved and landlocked lots, in the District of Columbia, Square 1321, Lot 822 and Square 1322, Lot 817 (the "Georgetown Lots"), and to set the basis of Mr. Gordon's compensation; and upon consideration of all the files and records in this case, the motions opposing such appointment and the responses of March 25, 1993 and April 30, 1993 by the Trust Company opposing the appointment of Gilbert Hahn, Jr.; and upon consideration of the May 14, 1993 response by the District of Columbia recognizing that the Georgetown Lots, which were indicated as security for the payment of Transit's $4.7 million promissory note and were accepted by petitioners' attorneys as having considerable value, appear to demand extensive legal work before any substantial value may be realized,[1] and further recognizing that other Transit assets may be unavailable to satisfy the claims of the Riders' Fund because they are subject to prior liens, and with all these problems the District of Columbia expressing great confidence in Mr. Bebchick's judgment and abilities and that it was satisfied his litigation, strategy and tactics would serve the best interests of the Riders' Fund; it is

ORDERED, by the Court, for reasons set forth above and in the attached memorandum, that the motion of the Trust Company to appoint Mr. Gordon is approved and, it appearing by Order of May 26, 1993 that Mr. Gordon, at the request of counsel for the Trust Company, devoted 148 hours to this representation, prior to March 5, 1993 and since that date has devoted 163 hours, that the basis of his compensation as set forth in the March 5, 1993 engagement letter of Mr. Leonard N. Bebchick, Exhibit A attached hereto, as accepted and approved by Harold

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[1] When it was pointed out that the Georgetown Lots were inadequate security for the $4.7 million promissory note, the Trust Company added the note on the sale of the Navy Yard property that has since been liquidated and the security remaining for the balance due on the judgment is still very much problematic.

Gordon, Esquire, and amended by the June 15, 1993 Response to Request for Consideration, Exhibit B attached hereto, is approved; and it is

ORDERED, that Security Trust Company is authorized and directed forthwith, and before June 30, 1993, in view of the Court's approval of the engagement agreement by this order, to pay Mr. Gordon $65,000 from the Washington Metropolitan Area Riders' Fund as the first installment of his retainer and for services rendered; and it is

ORDERED, that the motion of March 17, 1993 of the Black United Front by its counsel Gilbert Hahn, Jr. opposing the appointment of Harold Gordon as special counsel in this matter and moving the court to appoint Gilbert Hahn, Jr. special counsel in place of Mr. Gordon is denied; and the petition of March 29, 1993 of the Democratic Central Committee by its counsel Landon G. Dowdey requesting the appointment of Mr. Hahn as counsel to handle the Georgetown Lots matter and also to appoint Mr. Hahn general counsel to the Riders' Fund to handle all collection matters replacing Mr. Bebchick is denied; and the motion of April 20, 1993 of the Democratic Central Committee by its counsel Landon G. Dowdey requesting the Court to appoint Gilbert Hahn, Jr. as general counsel to the Riders' Fund to handle all collection matters and to terminate the employment of Mr. Bebchick is denied; and the May 9, 1993 Interim Report to the Court by the Democratic Central Committee and the Black United Front on the subject of the Georgetown Lots Litigation and Sale and opposing the appointment of Mr. Gordon is denied; and the response of June 7, 1993 of Black United Front by its attorney Gilbert Hahn, Jr., continuing the objection to the appointment of Mr. Gordon and the proposed fee arrangement and repeating its proposal that Gilbert Hahn, Jr. replace Mr. Gordon is denied; and it appearing that the June 16, 1993 response of the Black United Front and Democratic Central Committee to the Court's order of June 15, 1993 by their attorneys Messrs. Gilbert Hahn, Jr., Esquire and

Landon G. Dowdey, Esquire, grossly misinterprets the Court's order and its implications, and for reasons set forth in the memorandum the suggestion that Mr. Gilbert Hahn, Jr. should replace Mr. Gordon is denied.

Per Curiam
For the Court:

Ron Garvin, Clerk

MEMORANDUM

One of the responsibilities of the Security Trust Company, N.A. ("Trust Company"), as Escrow Agent/Depositary for the Washington Metropolitan Area Riders' Fund (Riders' Fund), is to protect and enhance the value of Fund assets. The Georgetown Lots became an asset of the Riders' Fund when the Trust Company purchased these lots at a foreclosure sale occasioned by D.C. Transit's default on a $4.7 million note payable to the Riders' Fund and held by the Trust Company on behalf of the Riders' Fund. Although the Georgetown Lots had originally been accepted by petitioner's attorney as the sole security for this note, the Trust Company was able to purchase these lots for $300,000.00, less costs, at the foreclosure sale. The value of the lots, which are vacant, unimproved and landlocked property, was deflated due to the structure of the lots and to various legal problems including potential problems with access to the property.

In an effort to realize the greatest benefit of the Georgetown Lots to the Riders Fund, Mr. Bebchick, counsel for the Trust Company, has proposed an arrangement whereby the Riders' Fund would engage Harold Gordon, Esquire, an expert in real estate matters, as special counsel to assist him in his attempt to enhance the value of these lots. It appears that significant legal problems may have to be resolved before the property may be sold or developed.

As counsel in this matter, Mr. Bebchick has authority to employ associate counsel to assist him, and the Court has authority to approve such appointment. The Court accordingly has relied upon Mr. Bebchick's appraisal of Mr. Gordon's qualifications and approved his appointment to assist him, as counsel for the Security Trust Company, N.A. ("Trust Company") in his effort to establish and enhance the value of the "Georgetown Lots."

In spite of the extreme difficulty of enhancing the value of the Georgetown Lots, which the Court recognizes, their potential value is too great to be ignored; and those who object to the effort would be the first to object if the effort was not made. Both Transit and petitioners' attorneys place exorbitant value on the rights-of-way—which values they were not able to realize.* We, thus, consider that necessity requires the Court additionally to approve the retainer and the variable contingent fee arrangement for retention of Mr. Gordon on the terms set forth in the engagement letter of March 5, 1993 (Exhibit A attached) as subsequently amended by the June 15, 1993 Response to Request for Consideration (Exhibit B attached), as accepted and agreed to by Harold Gordon, Esquire and by Leonard N. Bebchick, counsel for the Trust Company, as agent of the Riders' Fund.

The Court notes that the sole compensation for Gordon's services after the original retainer, which also is based on services rendered, is:

> A contingent fee calculated as a variable percentage basis set forth in the engagement letter of enhanced value realized by [the Trust Company for the Riders' Fund] from the disposition of the ownership interest in the Georgetown Lots or their lease . . . computed per the . . . [agreement] percentage schedule [set forth in the letter] less the amount of [Gordon's] retainer. As used [in the contract] the term "enhanced value" means the gross proceeds or other return which [the Trust Company] secures from the Georgetown Lots less [the Trust Company's] acquisition cost for these properties which for this purpose is stipulated to be $350,000. . . . [The] contingent fee will be paid as and when [the Trust Company]

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* That the Georgetown Lots went for $300,000 at foreclosure sale is a good illustration of the value of the most desirable property.

> receives cash or equivalent as a result of such disposition.

Bebchick Letter, March 5, 1993, pp. 2-3 (Exhibit A attached; see also Exhibit B attached).

The contingent fee arrangement is absolute—based on "realized" enhanced value to be paid only as and when the Trust Company receives "cash or equivalent as a result of [a] disposition," of the lots. The Court has approved the appointment of Mr. Gordon as his qualifications and experience appear to be superior to the other suggestions.

Because this attempt may greatly enhance the value of an asset held on behalf of the Riders' Fund, payment is justified of a modest retainer based on services rendered and upon a variable contingency fee arrangement.

EXHIBIT A

Law Offices
LEONARD N. BEBCHICK
888 SIXTEENTH STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006

TEL. (202) 835-1921
FAX (202) 835-8136
DATA (202) 223-3644

March 5, 1993

Harold Gordon, Esq.
Suite 250
1050 Connecticut Avenue, Nw
Washington, D.C. 20036

Dear Mr. Gordon,

This sets forth our agreement as to the basis upon which Security Trust Company, N.A. ("STC"), acting as agent of the Washington Metropolitan Area Riders' Fund ("Riders' Fund"), is retaining your services as special counsel for the purposes described below. Your retention under the terms hereof is subject to the approval of the U.S. Court of Appeals for the District of Columbia Circuit ("the Court").

You are engaged to provided, and you agree diligently to provide all legal services as are necessary and appropriate to enable the Riders' Fund to secure the maximum possible return through ultimate disposition or otherwise of the two parcels of vacant and unimproved land—Sq. 1321, Lot 822 and Sq. 1322, Lot 817 ("the Georgetown Lots") which STC recently acquired on behalf of the Riders Fund at foreclosure sale. You are fully familiar with the Georgetown Lots and have conducted considerable research for us as to their legal status and possible potential. Among the legal services which you are undertaking to provide are the following:

—Securing by negotiation and/or litigation full unimpeded access to the two parcels which is defeasible to a bona fide purchaser for value. Although the outcome of these efforts cannot be predicted with assurance, you have expressed the view that such access eventually can be secured.

—Securing by proceedings before the appropriate D.C. zoning authorities and other regulatory bodies rights and permissions to develop the Georgetown lots to their maximum economic potential.

—Securing by negotiation and/or litigation the highest possible award should any agency threaten or undertake condemnation or like proceedings.

In performing your services hereunder, you will report to the undersigned (or his designee or successor) whom you shall keep fully advised of all pertinent developments and whose approval shall be secured prior to the taking of substantive actions. It is understood and agreed that STC, as agent of the Riders' Fund, (or its successor as designated by the Court) shall at all times possess the right to determine in its sole and absolute discretion (a) at what time or times and in what manner it shall dispose of the Georgetown Lots or otherwise realize the value of this holding, and (b) whether and to what extent any particular proceeding or course of action shall be pursued or continued.

To enable you to effectively perform your services hereunder, you intend to associate other counsel with whom you previously have worked to provide all necessary support as required. At present you do not contemplate a need for such assistance except for the conduct of litigation, and you have arranged for Robert D. Roadman, Esq. to aid you in that regard. It is understood and agreed that the compensation of such assisting counsel will be provided by you and will not be chargeable against STC. In addition to your compensation, you will be reimbursed

for your actual and reasonable out-of-pocket disbursements to third parties with no markups or service or like charges.

The compensation for all your services hereunder shall be as follows:

1. A retainer of $100,000 payable in two installments—$65,000 within ten days of the Court's approval of this agreement and $35,000 after you have expended 125 hours of additional effort in this representation or, if earlier, when your contingent fee or the first installment thereof becomes payable. Payment of the initial $65,000 installment hereunder shall, *inter alia*, constitute full payment to you for all services heretofore rendered by you to STC and me.

2. A contingent fee calculated as (a) a portion of the enhanced value realized by STC from the disposition of its ownership interest in Georgetown Lots or their lease ("the disposition") computed per the following percentage schedule, less (b) the amount of your retainer. As used herein the term "enhanced value" means the gross proceeds or other return which STC secures from the Georgetown Lots less STC's acquisition costs of these properties which for this purpose is stipulated to be $350,000.

Enhanced Value	Contingent Fee Percentage
0-$1 million	15.0% of the 1st million
$1-2 million	$150,000 plus 17.5% above 1 million
$2-3 million	$325,000 plus 20.0% above 2 million
$3-4 million	$525,000 plus 22.5% above 3 million
$4-5 million	$750,000 plus 20.0% above 4 million
$5-6 million	$950,000 plus 15.0% above 5 million
$6-10 million	$1,100,000 plus 10.0% above 6 million
Above $10 million	$1,500,000

Your contingent fee will be paid as and when STC receives cash or equivalent as a result of such disposition.

If the proceeds of the disposition are received by STC in installments, your contingent fee will be paid pro rata and based upon the above schedule, *vis.* 15% of the first $1 million of receipts representing enhanced value, 17.5% of the next $1 million, etc. If STC receives interest on deferred payments due from the disposition, you shall receive that portion of each interest receipt which the amount of your deferred contingent fee bears to the total amount of the deferred payments.

Should Lot 817 or Lot 822 disposed of separately, you shall receive a proportionate share of your contingent fee for each disposition. For purposes calculating your contingent fee, STC's acquisition cost of Lot 817 and Lot 822 is stipulated to be $30,000 and $320,000 respectively, and your retainer is allocated between these two parcels at $8575 and $91,425 respectively.

3. Should your engagement be terminated prior to the completion of all services for which you are engaged (whether by death, disability, for cause or any other reason), you or your estate will be entitled to that portion of your retainer and contingent fee as appears to be equitable under the circumstances. Should any dispute arise as to the amount of such equitable entitlement, the matter shall conclusively determined through binding arbitration conducted under AAA rules by a single arbitrator to whom the parties agree or, failing that, who is appointed by the person then serving as President of the D.C. Bar. This agreement and all matters arising thereunder shall be governed by D.C. law.

If the foregoing fully and accurately sets forth our agreement, would you kindly countersign and return the enclosed copy of this letter, and we will proceed to advise the Court and request its approval of your engagement.

Sincerely yours,

Leonard N. Bebchick
Counsel for STC, as agent of the Riders' Fund.

ACCEPTED AND AGREED:

Harold Gordon, Esq.

EXHIBIT B
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed June 15, 1993

Ron Garvin
Clerk

RESPONSE TO REQUEST FOR CONSIDERATION

Security Trust Company, N.A. and Harold Gordon have considered the court's suggestion respecting Mr. Gordon's fee, and they are pleased to advise the court that Mr. Gordon is prepared to limit his contingent fee to $1 million. His fee agreement with STC of March 5, 1993 shall be deemed as so amended.

For the avoidance of doubt, we set forth our understanding that this $1 million cap under the terms of the fee agreement will be reached if and when the Georgetown Lots are disposed of for $5,683,334. Under the formula appearing in paragraph 2 of the fee agreement, a $5,683,334 sales price is reduced by the stipulated acquisition cost of $350,000 to produce an enhanced value of $5,333,334. Under the percentage of enhanced value sliding scale, that produces a fee of $1 million form which is subtracted Mr. Gordon's $100,000 retainer. At that stage, Mr. Gordon will receive $900,000 in addition to his $100,000 retainer for a total contingent fee of $1 million.

Leonard N. Bebchick
Suite 600
888 Sixteenth St., NW
Washington, D.C 20006
Tel: (202) 835-1921
Counsel for Security Trust Company

Harold Gordon
Suite 250
1250 Connecticut Avenue, NW
Washington, DC 20036

June 15, 1993

[Certificate of Service ommitted in this printing]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

---

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed June 28, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

Upon the request of the Security Trust company, N.A., Escrow Agent/Depositary for the Riders' Fund, it is

ORDERED, that the Trust Company is hereby authorized and directed forthwith, and before June 30, 1993, to pay

—the following bills of attorneys as filed with the Court on June 17, 1993:

> Weil, Gotshal & Manges, $27,066.43 for services rendered during the period August 18, 1992-March 16, 1993.
>
> Leonard M. Bebchick, Counsel for the Security Trust Company, $144,000.00 for services rendered during the eleven-month period July 10, 1992-June 11, 1993.

Per Curiam
For the Court:

Ron Garvin, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,
Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed June 28, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

It is,

ORDERED, by the Court, that the Security Trust Company, N.A. is hereby authorized and directed forthwith to make payment from the Riders' Fund of $8,987.85 to

Cooter & Gell as reimbursement for foreclosure costs as set forth in the attached statement.

Per Curiam
For the Court:

Ron Garvin, Clerk

LAW OFFICES
COOTER & GELL
1201 New York Avenue, N.W.
Suite 900
Washington, D.C. 20005
TEL (202) 289-5600
FAX (202) 371-1907

Joseph M. Cahill

Writer's Direct Dial
(202) 269-5623

Leonard Bebchick, Esq.
888 16th Street, N.W.
Suite 600
Washington, D.C. 20006

RE: *D.C. Transit System, Inc. Foreclosure*

Dear Mr. Bebchick:

The following is a list of the major costs incurred for advertising and bond expenses in the above referenced foreclosure:

April 1993 P.G. Co. Ad	$1,691.28
April 1993 Montgomery Co. Ad	$1,545.00
June 1993 P.G. Co. Ad	$1,871.37
June 1993 Montgomery Co. Ad	$1,792.20
Trustee's Bond	$2,088.00
	$8,987.85

I would appreciate your obtaining authorization for payment by the Substitute Trustee or Security Trust Company of the above items.

Sincerely,

John M. Cahill

JMC:ldf

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 1, 1993 Filed September 21, 1993

No. 21865

DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA, *et al.*,
PETITIONERS

v.

THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
RESPONDENT

D.C. TRANSIT SYSTEM, INC.,
INTERVENOR

And Consolidated Cases Nos. 24398, 24415 and 24428

(Attorneys' Fees)

Gilbert Hahn, Jr. was on the request for further fees for Black United Front, *et al.*, petitioners in No. 24428.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Leonard Bebchick was on the opposition to the request for further fees for Security Trust Company, N.A. as escrow agent/depositary for the account of the Washington Metropolitan Area Riders' Fund.

Landon G. Dowdey for Democratic Central Committee of the District of Columbia, *et al.*, petitioners in Nos. 21865 and 24398.

Harvey M. Spear for D.C. Transit System, Inc., intervenor in Nos. 21865, 24398, 24415, and 24428.

Lutz Alexander Prager, Deputy Assistant Corporation Counsel, for District of Columbia, petitioner in No. 24415.

O. Roy Chalk, pro se.

Before: BUCKLEY and RANDOLPH, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge.*

Opinion for the Court filed PER CURIAM.

PER CURIAM. In two separate cases petitioners attacked the validity of some fare increases collected by D.C. Transit System, Inc. ("Transit") prior to its takeover by Metro. After extensive litigation extending over a number of years, the parties reached a Compromise Agreement (Agreement) that was approved by the Court's order of February 26, 1990. The Agreement provided, *inter alia*, for the eventual payment by Transit of $9.2 million [1] in restitution for the benefit

[1] The report of the Washington Metropolitan Area Transit Commission found that the total amount of restitution due in *DCC–III*, which consolidated the Black United Front and the Democratic Central Committee cases, was $3,106,468 as of June 28, 1973. This represents the fare overcharge that petitioners' attorneys rectified. The interest increment on this amount of restitution from June 28, 1973 through June 16, 1988 was $6,848,551 bringing the total restitution plus interest increment to $9,955,019 through June 16, 1988. When the Commission's expenses in the DCC remands and its expenses are subtracted from the total restitution demand plus interest increment, the result is a net restitution in *the DCC–III* cases of $9,812,633 as of June 16, 1988. *Report of Findings and Recommendations of the Washington Metro. Area Transit*

of the Washington Metropolitan Area Riders' Fund ("Riders' Fund"), and for payment to petitioners' attorneys of fees in two installments dependent upon the amount of restitution paid in cash.

THE PROVISION FOR PETITIONERS' ATTORNEYS' FEES

The Compromise Agreement of January 26, 1990, provided that at its closing set for May 29, 1990 Transit was to deliver to Security Trust Company, N.A. (the "Trust Company"), as the Escrow Agent/Depositary for the Washington Metropolitan Area Riders' Fund, $4.7 million in cash as partial restitution and was to deliver a $4.5 million promissory note payable to the Riders' Fund on July 14, 1992.[2] The $4.5 million note stated that it was secured by first lien deeds of trust on Transit's rights-of-way in Montgomery and Prince George's Counties in Maryland and, based upon such security, and the anticipated timely receipt by the Riders' Fund of $9.2 million in restitution in two installments, the Court approved the Compromise Agreement provisions for payment to petitioners' attorneys of fees as follows:

> 3.1 *Attorneys' Fees and Expenses.* From the Four Million Seven Hundred Thousand ($4,700,000) Dollars in cash funds delivered to the Escrow Agent at the closing, the principal and interest on the promissory note paid to the Escrow Agent as provided by Section 1.1 and 1.4 hereof, and the proceeds from reinvested funds, the Escrow Agent will pay the following attorneys' fees and expenses:
>
> (a) To Landon G. Dowdey, (1) at the time of closing, $500,000 for attorneys' fees and $20,601.45 for out of pocket costs; and (2) on the date that each interest payment is made on the promissory note, 11.11% of each such interest payment to and including the date of the final interest payment; and (3) $500,000 on the date that the principal and final installment of interest on the

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Comm'n, December 9, 1988. It was this sum of $9,812,633 that the parties compromised in agreeing on a payment of $9,200,000.

[2] Compromise Agreement, sections 1.1 and 1.2.

promissory note for Four Million Five Hundred Thousand ($4,500,000) Dollars are paid in full; and

(b) To Gilbert Hahn, Jr., (1) at the time of closing, $500,000 for attorneys' fees and $29,810.71 for out of pocket costs; and (2) on the date that each interest payment is made on the promissory note, 11.11% of each such interest payment to and including the date of the final interest payment; and (3) $500,000 on the date that the principal and final installment of interest on the promissory note for Four Million Five Hundred Thousand ($4,500,000) Dollars are paid in full; and

(c) No other attorneys' fees or expenses will be paid or payable to any of the parties hereto out of the funds provided by the Compromise Agreement.

Transit's Defaults and Subsequent Agreements

However, Transit defaulted in making the first $4.7 million cash payment and the "closing" of the Compromise Agreement never took place. Thereafter the parties in a Supplemental Agreement concurred upon new terms for payment of the $9.2 million to the Riders' Fund. According to the new terms the due date for the $4.7 million cash payment was extended to September 13, 1990, and, in the event Transit failed to make the $4.7 million payment on that date, the Agreement required Transit to deliver to the Trust Company a promissory note for $4.7 million payable on July 14, 1992, including the same terms as the original $4.5 million note. Transit again defaulted on September 13, 1990 in making the required cash payment and subsequently delivered a promissory note for $4.7 million to the Trust Company. This $4.7 million note stated that it was secured by a deed of trust on two irregular lots within the District of Columbia. These lots are referred to as the "Georgetown Lots."

The Navy Yard Sale

On August 3, 1990, with the Court's approval, Transit sold its Navy Yard Property to 770 Limited Partnership. Part of the consideration for the sale was evidenced by a $4.5 million

promissory note ("Navy Yard note") payable to Transit in quarterly installments of principal and interest over a five-year period. Shortly after this sale it was discovered that additional security was required for the indebtedness represented by the two promissory notes secured by the Georgetown Lots and the Maryland rights-of-way because problems regarding easements, title and access to the properties indicated that the security value attributed to the parcels of land was questionable. To improve the security for the notes, Transit was required to assign the $4.5 million Navy Yard note to the Trust Company for the Riders' Fund as additional security for payment of the $4.5 million and $4.7 million notes.

As installment payments were made on the Navy Yard note they were applied against principal and interest due on Transit's two notes payable to the Riders' Fund. And in order to compensate petitioners' attorneys for Transit's delay in making the principal payments upon which their attorneys' fees were based, the Court approved the provision in the Supplemental Agreement, *supra*, directing the Trust Company to make payments from the Riders' Fund to each petitioners' attorney of 11.11% of each quarterly interest payment made on the Navy Yard note that was applied to interest on the $4.7 million note.

As of March 31, 1993 approximately $295,392.40 had been paid or credited to petitioners' attorneys from interest payments received on the Navy Yard note. We treat these payments from interest as compensation to petitioners' attorneys for delay suffered in receiving fees as agreed upon due to Transit's failure to make the required restitutionary payments, not as a credit against the reasonable attorneys' fees to be paid to petitioners' attorneys. Nevertheless, the $295,392.40 does constitute compensation that petitioners' attorneys have received.[3]

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[3] When the $147,696.20 paid or credited from interest payments to each attorney is added to the total of $500,000 and costs in attorneys' fees paid by recent order of the Court, a total of $647,696.20 will have been received by each attorney.

Collection Procedures

At this stage of the matter, the two notes having been assigned to the Trust Company for the benefit of the Riders' Fund, it became apparent that Transit was about to default in the payment of these two notes and that the security petitioners' attorneys had accepted for these notes was of questionable sufficiency. To meet this emergency the Trust Company on July 9, 1992, with the Court's approval, appointed Mr. Leonard N. Bebchick as its counsel to collect the balance due on the two notes. Mr. Bebchick had previously handled a similar case against Transit in an outstanding manner.

Application of Payment on The Navy Yard Note to the Promissory Notes

On February 1, 1993 the Trust Company discounted the Navy Yard note which then, due to interim payments, had a discounted face value of $3,804,340.45, and the Trust Company credited that amount as a payment on Transit's $4.5 million note payable to the Riders' Fund. This reduced the unpaid balance on Transit's $4.5 million note to $695,659.55. At that time the application of some of the installment payments made on the Navy Yard note to Transit's $4.7 million promissory note had reduced the unpaid principal balance on that note by $432,409.84 leaving a balance due on that note of $4,267,590.16. Thus, the total amount of restitution due and unpaid on both notes as of February 2, 1993 including accrued interest of $12,875.08 was $4,976,124.79—slightly over half of the original obligation of $9.2 million—the total credits against the total principal debt of $9.2 million being $4,236,750.29.

Collection Difficulties

The default by Transit in failing to make the cash payment of $4.7 million due on May 29, 1990 as required by the Compromise Agreement of January 26, 1990, and Transit's later default on July 14, 1992 in not paying the balance due on the two notes at maturity as required by their terms and the Supplemental Agreement, constituted a substantial breach of

the Compromise and Supplemental Agreements and a violation of the Court's orders. As a result of these defaults by Transit, while some payments had been credited on the notes, the total sum upon which the payment of the initial attorneys' fees of $1 million was predicated has not been paid and liquidating the property that petitioners' attorneys had accepted as security for the notes, and any other available property or assets of Transit, presents considerable difficulties. Counsel for the Trust Company thus faces the task of searching for assets and resorting to extensive activities in an endeavor to collect a very substantial sum of money from an insolvent debtor and assets of difficult liquidity.

Trust Company counsel is vigorously moving to realize on the security for the notes, and on such other available assets of D.C. Transit as he may find, in order to satisfy the Judgment against Transit of $4,976,124.79 and interest as decreed and entered by this Court on March 30, 1993. *Democratic Cent. Comm. of the District of Columbia, et al. v. Washington Metro. Area Transit Comm'n*, 988 F.2d 1239 (D.C. Cir. 1993). However, aside from the proceeds realized from the sale of the Navy Yard note, which was not part of the security that petitioners' attorneys originally accepted for either promissory note, the original security for the two notes has yet to produce any net benefit to the Riders' Fund. Additionally, counsel for the Trust Company is likely to have great difficulty in reaching any of Transit's remaining assets because the Chalks in recent years have extensively encumbered most of Transit's remaining limited assets with deeds of trust.

The Security for the Promissory Notes

In reviewing the amount of fees for petitioners' attorneys we must take into account that some of the properties they accepted as "security" for the $9.2 million due on the promissory notes are of questionable ownership and value. Some also have difficult problems of access.

(a) *Security for the $4.7 million promissory note.*

The $4.7 million promissory note states:

> This note is secured by a First Deed of Trust to Charles G. Cusic, Jr. and Lisa D. Brown, Trustees, and dated as of May 29, 1990 on Lot 817 in Square 1322 and Lot 822 in Square 1321.

The lots referred to are the "Georgetown Lots." According to a surveyor's map these lots are two non-contiguous parcels in the District of Columbia nearby Georgetown University. One large lot (Lot 822 in Square 1321) transects Fowler's Road and continues westward to Glover–Archbold Parkway, while a very small lot (Lot 817 in Square 1322) is a narrow former right-of-way that abuts on Foxhall Road, and then runs east a very short distance to Glover–Archbold Parkway. Glover–Archbold Park separates the two lots. The access to Lot 822 may be insufficient, questionable or at least difficult to establish.

Because of the questionable access to Georgetown Lot 822 and possible zoning difficulties, and its resulting questionable value, Transit was required to put up additional security for the $4.7 million promissory note. To meet this requirement Transit assigned the Navy Yard note to the Riders' Fund. That note has now been discounted and paid into the Riders' Fund, and the only designated security left for the $4,976,124.79 unpaid balance on the two notes are the Maryland rights-of-way and the Georgetown Lots. In addition the Riders' Fund may levy upon or attach any corporate asset of Transit whose value exceeds any encumbrance that is prior to the Riders' Fund judgment.

(b) *Security for the $4.5 million promissory note.*

The promissory note for $4.5 million states that it is:

> Secured by a first Deed of Trust dated May 29, 1990, on The Cabin John Right–of–Way in Montgomery County, Maryland, and a first Deed of Trust dated May 29, 1990, on the Prince George's County Right–of–Way, Prince George's County, Maryland.

The Commitment for Title Insurance of April 6, 1990 on the Montgomery County properties indicated eleven (11) parcels

were "rights-of-way"—some indicated for "railway purposes." Eleven additional parcels were owned in fee simple, and the deeds for an additional eleven parcels contained specific limitations, conditions and restrictions. The title insurance commitment also stated it would except some "rights of way . . . due to possible abandonment." Some of the properties and rights-of-way given as security appear *not* to be owned in fee simple and several parcels are non-contiguous.

The Commitment for Title Insurance of March 9, 1990 on the Prince George's County rights-of-way and other properties indicated similar exceptions and limitations affecting their value. On June 16, 1993 the Trust Company foreclosed on the properties in Montgomery County that were considered to have some potential value; and on the same date similarly foreclosed on three similar properties in Prince George's County.

Attorneys' Fees in Common Fund Cases

The award of attorneys' fees in common fund cases is based on

> the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund property itself or directly from the other parties enjoying the benefit.

Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 257 (1975). Generally courts have justified the award of fees in these cases under one of two basic rationales. The court may find that the class representative is authorized to contract for the entire class and is therefore authorized to pay the expense of litigation with funds intended to benefit the entire class. *See, e.g., Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 792, 794 (S.D.N.Y. 1947). The other theory is based on quasi-contract:

> When the representative plaintiff recovers a judgment in which the absent class members will share, it is only

> equitable that he be reimbursed for his expenses from the judgment, else the represented persons get a windfall.

6 Jeremy C. Moore et al., *Moore's Federal Practice* ¶ 54.78(3) (2d ed. 1993); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (the common fund exception "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense."). In any event, the common fund doctrine is a well established exception to the so-called American Rule which provides that under normal circumstances parties are responsible for their own costs. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975); *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners*, 456 U.S. 717, 721 (1982); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683–84 (1983); *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986); *Puerto Rico v. Heckler*, 745 F.2d 709, 714 (D.C. Cir. 1984).

Once it is determined that the attorneys are entitled to be paid from the common fund, it is the duty of the court to determine the appropriate amount. Cases have recognized that jurisdiction over the case also carries with it the equitable jurisdiction to award reasonable attorneys' fees in appropriate circumstances. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 523 (1st Cir. 1991). Court approval of attorneys' fees in common fund cases is especially desirable because, when it comes to the question of fees, "the interests of the class members' attorneys may differ from the interests of the class members themselves." 3B Jeremy C. Moore et al., *Moore's Federal Practice* ¶ 23.91 (2d ed. 1993). The First Circuit has recognized that "the conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." *Weinberger*, 925 F.2d at 524. Therefore, the court must act to protect the interests of the class members and to insure that the fee awarded is reasonable. *See Swedish Hosp. Corp. v. Shalala*, Nos. 92–5061, 92–5155, slip op. at 7–8 (D.C. Cir. Aug. 10, 1993).

In most fee-shifting cases a court will determine a reasonable fee using the lodestar method, that is, multiplying the reasonable hours expended by a reasonable hourly rate. In common fund cases, however, courts often award fees based on a reasonable percentage of the fund. *See Swedish Hosp. Corp.*, slip op. at 11 (listing cases). In fact, every Supreme Court case that has addressed the issue has determined reasonable fees payable from a common fund on a percentage of the fund basis. *See, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Central R.R. & Banking v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1882). In these cases the percentage is to be determined by the court based on reasonableness under the circumstances of a particular case.

In 1985 a Third Circuit task force commissioned to study the problems of court-awarded fees determined that the percentage of the fund method was the best way to achieve the goals in common fund cases of fair and reasonable compensation, predictability, simplification, the discouragement of abuses and fairness to the parties. *Court Awarded Fees*, Report of the Third Circuit Task Force, October 8, 1985, 108 F.R.D. 237, 255 (1985). The percentage of the fund approach helps to align more closely the interests of the attorneys with the interests of the parties. *See Swedish Hosp. Corp.*, slip op. at 14–15.

BACKGROUND FOR PETITIONERS' ATTORNEYS FEES

Transit's failure to pay approximately $5 million of the amount of restitution upon which the February 26, 1990 order for the payment of $2 million in attorneys' fees was based, and the resulting need for the Trust Company to appoint Mr. Bebchick as counsel in order to collect that amount, renders that Court order inoperative. Thus, since approximately $5 million of the $9.2 million which was to serve as the basis for paying petitioners' attorneys fees remains unpaid, and the services of petitioners' attorneys have terminated with respect to the litigation, it is necessary for the Court to determine reasonable attorneys' fees that should be paid to

the petitioners' attorneys for their services. In determining this amount the Court is not bound by its order of February 26, 1990, or the subsequent Supplemental Agreement because those agreements were never closed and because the amount of restitution upon which those fees were to be paid has never been fully realized.

On March 30, 1993 when judgment was entered against Transit for $4,963,249.71, and $12,875.08 in interest, $4,236,750.29 represented the total principal payments in restitution that had been made on the promissory notes for $9.2 million. If the principal payments had been applied in their entirety to the note for $4.7 million, a balance of $463,249.71 would still be unpaid. Thus, even if the Agreement of January 26, 1990 had closed, petitioners' attorneys would still not be entitled to their initial fees of $500,000.

Application of Credit for Foreclosed Properties

In addition to the sums that have been credited against the $9.2 million principal amount due on the notes by virtue of restitutionary payments received on the Navy Yard note, we credit an additional $277,970.01. On January 19, 1993 long after the petitioners' active participation in the cases had terminated, the Trust Company, on behalf of the Riders' Fund, bid $300,000 of Transit's indebtedness in acquiring the Georgetown Lots at a foreclosure sale. These lots had served as the original security for Transit's $4.7 million promissory note. Following the deduction of costs, $254,510.76 was credited to Transit. Subsequently the Trust Company foreclosed on the Maryland rights-of-way bidding $42,500 to acquire such properties. These rights-of-way had served as original security for the $4.5 million note. Foreclosure costs have totalled $19,040.75, and Transit was credited with the remaining $23,459.25. Thus, as a result of these foreclosures, Transit is entitled to an additional credit of $277,970.01. When this $277,970.01 is credited against Transit's $9.2 million restitution requirement Transit is entitled to a total credit of $4,514,720.30—approximately 49.1% on the total sum due.

The sum of $4,514,720.30 also represents 96.1% of the payments of principal required by the $4.7 million note—the amount of restitution required by the February 26, 1990 order to be paid to qualify for the first attorneys' fees payment of $500,000 to each counsel if the Compromise Agreement had closed and become effective.

Computation of Attorneys' Fees

Under the Court's order of June 22, 1993 the Trust Company paid fees and expenses out of the Riders' Fund to petitioners' attorneys totalling $1,050,412.16. The payment of $500,000.00 and costs to each attorney constituted 23.3% of $4,514,720.30 which represents the sum total of all principal payments made by Transit as restitution.[4]

This figure is roughly comparable to the 25% paid to Mr. Bebchick in his line of cases after an enhancement based on the quality of his representation—*Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 405 (D.C. Cir. 1986)—and the full amount of restitution had been paid (*see Bebchick Response to Request for Further Fees*, January 26, 1993) and it falls well within the range usually awarded in common fund cases. *Swedish Hosp. Corp.*, slip op. at 21 ("[A] review of similar cases reveals that a majority of common fund class action fee awards fall between twenty and thirty percent."); *Camden I Condominium Ass'n Inc. v. Dunkle*,

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[4] The $4,514,720.30 figure represents $3,804,340.45 Navy Yard Note proceeds, $432,409.84 principal payments, and $277,970.01 foreclosure sales. If any additional foreclosure costs attributed to the Maryland rights-of-way are determined and assessed against Transit, the foreclosure figure will decrease; similarly, if any additional properties are acquired by foreclosure, the figure will increase.

Petitioners' attorneys had also been paid a total of $295,392.40 from payments of interest received on the promissory notes. That petitioners' attorneys have received this sum out of interest payments made on the promissory notes precludes using the total interest payments received to bolster the total principal payments of restitution.

946 F.2d 768, 774 (11th Cir. 1991) ("The majority of common fund fee awards fall between 20% and 30% of the fund.").

The figure is also roughly comparable to the percentage that the attorneys would have been entitled to had the Compromise and Supplemental Agreements become effective. As mentioned above, the original agreements called for attorneys' fees and expense payments of $1,050,412.16 (22.3%) when the note for $4.7 million was fully paid in cash. Thus, the Court order of June 22, 1993 actually awarded petitioners' attorneys an amount that slightly exceeds the amount they would have been entitled to under the Compromise and Supplemental Agreements. In fact, it could be argued that under the strict terms of these agreements the petitioners' attorneys would not be entitled to any fees until the $4.7 million note was paid in full. However, under the circumstances of this case we do not consider it equitable to enforce such strict construction. The Court considers this award of fees to be reasonable and equitable considering the interests of both the attorneys and the class of beneficiaries. *See, e.g., Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) ("[W]e require only that fee awards in common fund cases be reasonable under the circumstances.").

At this point, the benefits provided to the class by petitioners' attorneys have been all but exhausted. Although they did secure the two promissory notes as evidence of Transit's indebtedness to the Riders' Fund, it appears that these notes were woefully under-secured. Practically all of the property that petitioners' attorneys finally accepted as security for these notes has been sold either outright or at a foreclosure sale, and the Riders' Fund is still approximately $5 million short of the total amount of restitution that is due in conformance with the agreements of the parties.

We conclude in view of all the files and records in these cases, all motions of the parties, and for all the reasons set forth above that $500,000 and costs to each attorney is an appropriate fee for their entire services in these cases. *See Swedish Hosp. Corp.*, slip op. at 21 ("We hold that the court was within its discretion in basing its fee calculation only on

that part of the fund for which counsel was responsible."). This amount awarded by the Court's order of June 22, 1993 is roughly equivalent to the percentage agreed to by the parties in the Compromise and Supplemental Agreements and falls within the range normally awarded in common fund cases. In these circumstances we are of opinion that the payment to each attorney of $500,000.00 and costs is reasonable and justifiable.

REQUEST FOR $600,000 FURTHER FEES

Both petitioners' attorneys also seek an "additional" $300,000 fee ($600,000 total) because they were allegedly relieved "without cause" from their participation in the case. Apart from any discussion of the "cause," petitioners' attorneys *were not relieved, their services simply came to an end.* When the very difficult problem of collecting the unpaid sums due on the notes held by the Trust Company became the duty of the Trust Company in carrying out its obligation to the Riders' Fund as Escrow Agent, the Trust Company was clearly entitled, with court approval, to select Mr. Bebchick as its own counsel to collect on the defaulted notes. There was never any assurance that the Trust Company would employ petitioners' attorneys to collect on the promissory notes after the notes were not paid at maturity and thus became an obligation of the Riders' Fund to collect.

Petitioners' attorneys' request is also based upon the "anticipated receipt in cash on or about January 30, 1993 of funds from the Navy Yard note," and upon the contention that the fee request was supported by an alleged "Bebchick Principle," i.e., fees paid to Mr. Bebchick in an earlier D.C. Transit invalid fares case. *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 400 (D.C. Cir. 1986). However, as heretofore noted, the payments received on the Navy Yard note have already been taken into consideration by the Court.

In addition, petitioners' attorneys cannot rely upon any so-called "Bebchick Principle" in this case. In *Bebchick* the full attorney's fee was not paid until the amount of restitution had

been paid in full, *supra* at p. 13, and the Court awarded an upward enhancement to his fee because of the "unusually good representation" Mr. Bebchick provided, 805 F.2d at 407, and because he "exhibited an unusually high level of skill which is not reflected in the hourly charge utilized to compute the lodestar." 805 F.2d at 408. Such justifications do not exist here.

CONCLUSION

The Court, accordingly, by its recent order of June 22, 1993 authorized and directed the Trust Company to pay petitioners' attorneys a total of $1 million from the Riders' Fund; i.e., $500,000 to each attorney, and their out of pocket expenses.[5]

The request of January 19, 1993 by petitioners' attorneys for "Further Fees" of $600,000 ($300,000 each) and "(b) 11.11% [?] interest on [an alleged] ... $200,000 balance due each counsel to accrue at a rate equal to the yield realized by the funds deposited in the bank; and (c) 11.11% of any interest payment made into the [Riders' F]und" are each denied in their entirety. Petitioners' attorneys have been paid in full for their services and no further services are due, nor are any sums accruing.

Judgment Accordingly.

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[5] If petitioners' attorneys have any additional reimbursable costs, they may submit an appropriate motion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed June 28, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

Upon further consideration of the Court's order of June 28, 1993, it is

ORDERED, by the Court, that the Security Trust Company, N.A. forthwith pay Mr. Harold Gordon, Esquire,

$35,000.00 from the Riders' Fund as the balance due on his retainer.

Per Curiam
For the Court:

Ron Garvin, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,
Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases

United States Court of Appeals For the District of Columbia Circuit

Filed Jul 01, 1993

Ron Garvin
Clerk

BEFORE: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge.

O R D E R

Upon consideration of petitioners' Petition for Rehearing, filed June 7, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN

By: Cheri Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases

United States Court of Appeals For the District of Columbia Circuit

Filed Jul 01, 1993

Ron Garvin
Clerk

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge.

O R D E R

Petitioners' Suggestion for Rehearing *En Banc* has been circulated to the full Court. No member of the Court re-

quested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN

By: Cheri Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases

United States Court of Appeals For the District of Columbia Circuit

Filed Aug 13, 1993

Ron Garvin
Clerk

BEFORE: Buckley, and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

O R D E R

Upon consideration of petitioners' petition for rehearing, filed July 28, 1983, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN

By: Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,
Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases

United States Court of Appeals For the District of Columbia Circuit

Filed Aug 13, 1993

Ron Garvin
Clerk

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson and Randolph, Circuit Judges

O R D E R

Petitioners' Suggestion for Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN

By: Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, et al.,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398, 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed Mar 12, 1993

Constance L. Dupre
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of the partial motion of Landon G. Bowley and Gilbert Hahn, Jr. for fees and expenses for enforcement of the order and settlement, it is

ORDERED, that the motion be denied for reasons set forth in the attached Memorandum.

Per Curiam
FOR THE COURT:
Constance L. Dupre, Clerk

Linda Jones
Deputy Clerk

MEMORANDUM

Plaintiffs' attorney have moved the court to issue an order directing D.C. Transit System, Inc. to pay fees and expenses for services rendered in accordance with the provisions of paragraph 5.4 of the Compromise Agreement. This provision provides:

> In any action brought by any party to enforce this Compromise Agreement, the successful party shall be entitled to recover the costs of suit and its reasonable attorneys fees from the losing party.

From the foregoing it appears to the court that obtaining reasonable attorneys' fees depends upon a successful action being brought to enforce the Compromise Agreement.

Security Trust Company, N.A.

(202) 624-4180

July 6, 1992

The Honorable George E. MacKinnon
U.S. Court of Appeals
District of Columbia Circuit Court
Constitution and John Marshall Place, N.W.
Room 5423
Washington, D.C. 20001

Re: Democratic Central Committee of the District of Columbia vs. Washington Metropolitan Area Transit Commission D.C. Cir. No. 21865 and Consolidated Cases

Dear Judge MacKinnon:

Under the provisions of the Agreement to act as Escrow Agent/Depository dated February 28, 1990 under which Security Trust Company (the "Trust Company") acts as Escrow Agent/Depository for the Washington Metropolitan Transit Rider's Fund (the Riders' Fund") and as noteholder for the Riders' Fund with respect to notes in the amounts of $4,500,000 and $4,700,000, respectively, secured by First Deeds of Trust dated May 29, 1990, the Trust Company as noteholder may at its option take certain actions upon a default after having given notice of such default is not cured within a prescribed period of time.

In this regard, it has come to our attention that property taxes due on property securing the notes may not have been paid and, as said property has not been sold, it would appear the principal dues on the notes on July 14, 1992 is unlikely to be paid, resulting in a default and causing the Trust Company, as noteholder, to determine whether to take or not take certain actions.

As it would appear that the Trust Company may soon have to exercise various discretionary duties, we deem it appropriate to retain counsel at this time.

Since the Trust Company is representing the interest of the Riders' Fund and Amram & Hahn, P.C. and Landon Dowdey, Esq. also represent the interests of the Riders' Fund, and to reduce the expense to the Rider's Fund, we would propose with the Court's approval to retain them as our counsel.

For your review, a copy of their fee schedule is attached.

Sincerely,

Frederick W. Clark
Vice President

Enclosure
cc: Debra S. Taylor
Gilbert hahn

5581/cgl

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases

United States Court of Appeals For the District of Columbia Circuit

Filed Jul 09, 1992

Constance L. Dupre
Clerk

BEFORE: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge.

ORDER

It appearing that property taxes due on property securing the promissory notes of D.C. Transit System, Inc., which are held in the Riders' Fund by the Security Trust Company, N.A. (Trust Company) may not have been paid, and that the principal due on July 14, 1992 on said notes

in the amounts of $4,500,000 and $4,700,000, respectfully, secured by first deeds of trust dated May 29, 1990 is unlikely to be paid resulting in a further default that would cause the Trust Company as note holder to take or not take certain actions to protect the Riders' Fund, and the Trust Company has proposed retaining counsel with the approval of the court, it is

ORDERED, that the appointment by the Trust Company of Leonard N. Bebchick, Esq., of the Bar of the District of Columbia, 888 Sixteenth Street, N.W., Suite 600, Washington, D.C. 20006, to represent the interests of the Riders' Fund as counsel at an hourly charge of $250.00 is hereby authorized and approved.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: Cheri Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed May 26, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

It is

ORDERED, by the Court, that the attached letter of May 25, 1993 from Mr. Bebchick in response to the inquiry of the Court, be filed with the Clerk and served on the parties to the case.

Per Curiam
Ron Garvin, Clerk

EXHIBIT A

Law Offices
LEONARD N. BEBCHICK
888 SIXTEENTH STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006

TEL. (202) 835-1921
FAX (202) 835-8136
DATA (202) 223-3644

May 25, 1993

Honorable George E. MacKinnon
United States Circuit Judge
U.S. Court of Appeals for the
District of Columbia Circuit
U.S. Courthouse, Room 5329
333 Constitution Avenue, NW
Washington, DC 20001

Dear Judge MacKinnon,

This letter supplies the information you have requested as to Mr. Gordon's representational activities on behalf of the Riders' Fund.

1. From last July through May 13th, Mr. Gordon time records indicate that he has devoted 311 hours to this representation. At his normal hourly rate of $260, this represents a fee of over $80,860; if he had initially agreed to a reduced rate of $250, the amount due would still be $77,750. If the contingent fee agreement is not approved, I feel that the Riders' Fund is obligated for this amount as the services rendered have been valuable.

2. The contingent fee agreement of March 5 provides that Mr. Gordon be paid an initial retainer installment of $65,000 and a second installment of $35,000 after he has expended 125 hours of additional effort. Payment of the $65,000 first installment constitutes full payment for all services theretofore rendered by Mr. Gordon.

3. Our motion of March 9 states that Mr. Gordon previously had devoted some 135 hours to this representation at an indicated fee of some $35,000 at his normal $260 hourly rate. In fact, those 135 hours represented the tally as of February 16, and Mr. Gordon generated 13 additional hours of activity from February 16 through March 5, the date of the contingent fee agreement. Since March 5, he has recorded 163 additional hours to this representation. Some of this time represents his very helpful assistance regarding he Cabin John right-of-way. Although not reflected in the contingent fee agreement, Mr. Gordon agreed with me to provide STC with up to 25 hours of assistance on this matter at no charge.

4. As matters now stand, the Fund is properly indebted to Mr. Gordon for some $80,000. In addition to the 135 hours mentioned in our motion, he has since then devoted 176 further hours to these matters of which 163 occurred after March 5. Even if one subtracts 25 hours devoted to Cabin John matter (which is not chargeable only if the contingent fee agreement is approved), there still remains 138 hours of activity since March 5. However one views the figures, Mr. Gordon already has expended more than the 125 additional hours which triggers the payment of the second retainer payment of $35,000 under the contingent fee agreement.

5. In short, Mr. Gordon may now rightfully claims $80,000 if the contingent fee agreement is not approved and $100,000 if it is. If the agreement is not approved, the Fund will be obligated to pay Mr. Gordon for each hour of time from May 14th onward. If, on the other hand, the agreement is approved, Mr. Gordon is obligated to perform all of his contracted duties which may well run into thousands of hours and years of effort. Approval of the agreement at this time would generate a retainer "advance" to Mr. Gordon of $20,000—the difference between the full $100,000 retainer and what he has earned on an hourly basis to date. That hardly would appear to be a

windfall when one considers the very substantial representation obligations that Mr. Gordon has assumed. Indeed, the $20,000 "advance" should become fully "earned" within the next few months.

Sincerely yours,

Leonard N. Bebchick

cc: Harold Gordon, Esq.

FILED
JAN 7 1994
OFFICE OF THE CLERK

No. 93-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA, *et al.*, THE BLACK UNITED FRONT, *and* THE WASHINGTON AREA CONSTRUCTION INDUSTRY TASK FORCE,

Petitioners,

v.

THE WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, D.C. TRANSIT SYSTEM, INC., LEONARD N. BEBCHICK, HAROLD GORDON, COOTER & GELL, WEIL, GOTSHAL & MANGES, CADWALADER, WICKERSHAM & TAFT, SECURITY TRUST COMPANY, N.A., *and* THE GOVERNMENT OF THE DISTRICT OF COLUMBIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

On December 28, 1993 the Court below issued another order granting additional fees to Leonard Bebchick in the amount of $73,650 and promising further consideration of additional fees to him and to Cooter

& Gell, and to Hazel & Thomas. (1a, appendix to this supplemental brief). As shown by the certificates of service to the applications for such fees (3a and 4a) petitioners were not notified of such applications.

Petitioners learned of such applications from a copy of the response thereto filed by the Corporation Counsel for the District of Columbia dated December 22, 1993 and received by petitioners' counsel December 27, 1993, the day before this latest fee award to Mr. Bebchick. Petitioners filed an objection on December 30, 1993, but the lower court has yet to offer any explanation for entering this latest order directing payment of substantial fees to counsel selected by the court without prior notice to petitioners; nor has any reason yet been advanced for the entry of two earlier orders for fee awards now exceeding $359,000 to lawyers of the court's choosing without notice to the parties or their counsel. See petition, pp. 9-10, 13.

Also, the lower court has yet to offer any rationale for its fee awards to non-successful court appointed litigants in this common fund case. Nor has the lower court offered any rationale for disregarding the prohibition, contained in the settlement agreement of the parties, against such additional attorneys' fees.

Finally, the lower court has yet to pass on these petitioners' request for rehearing on the September 21, 1993 opinion and order reducing petitioners' counsel fees for creating this multimillion dollar settlement fund.

CONCLUSION

In these circumstances, it is suggested that this Court should grant the writ of certiorari and remand

the case with directions to the lower court to state its reasons for issuing what appear to be *ex parte* orders on July 9, 1992, May 13, 1993 and December 28, 1993; for awarding attorneys' fees to counsel of its choosing by orders dated May 13, 1993, June 28, 1993 and December 28, 1993; and further directing the lower court to act on petitioners' pending request for rehearing on the opinion and order of September 21, 1993.

Such a remand would facilitate review of what seems, on its face, systematic violations of Fifth Amendment Rights and departures from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision under Rule 10.1(a).

Respectfully submitted,

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APPENDIX

APPENDIX OF EXCERPTS FROM THE RECORD

	Appx.
Order from U.S. Court of Appeals paying Bebchick $73,650.00 and paying Cooter Law Firm, and Hazel & Thomas (12/28/93)	1a
Certificate of Service from Mr. Bebchick (12/15/93)	3a
Certificate of Service from Mr. Bebchick (12/27/93)	4a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1992

No. 21865

Democratic Central Committee of the District of Columbia, *et al.*,

Petitioners,

v.

The Washington Metropolitan Area Transit Commission,

Respondent,

D.C. Transit System, Inc.,

Intervenor

and Consolidated Cases Nos. 24398., 24415 and 24428

United States Court of Appeals For the District of Columbia Circuit

Filed December 28, 1993

Ron Garvin
Clerk

Before: Buckley and Randolph, Circuit Judges, and MacKinnon, Senior Circuit Judge

Upon consideration of the request, motion and itemized statements of the Security Trust Company, N.A., ("Trust Company"), the Response by the District of Columbia and the Reply to the Response of the District of Columbia by the Trust Company, it is hereby

ORDERED, by the Court, that the Trust Company pay to Leonard N. Bebchick for services rendered from June

14 to December 14, 1993, the sum of $73,650.00 and to Bernard Locraft $4,244.25 for legal services rendered from July to November 1993. Further consideration will be given to the Response of the District of Columbia to the fees for Mr. Bebchick, Cooter Law Firm, and Hazel & Thomas and any adjustments applied to future fees. Memorandum will follow.

Per Curiam
For the Court:

By: Cheri Carter
Deputy
Clerk

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Request For Payment of Fees and Expenses was served *personally* this 15th day of December 1993 by delivering a copy to the offices of:

Gerard Stief
Office of General Counsel
WMATA, Room 2D
600 5th Street, NW
Washington, DC 20001

Lutz A. Prager
Office Corporaton Counsel
One Judiciary Square
401 Fourth Street, N.W.
6th floor South
Washington, DC 20001

William Morrow
General Counsel
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1828 L Street, NW
Washington, DC 20036

_____

Leonard N. Bebchick

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Request For Payment of Fees and Expenses was served *personally* this 27th day of December 1993 by delivering a copy to the offices of:

Lutz A. Prager
Office Corporaton Counsel
One Judiciary Square
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6th floor South
Washington, DC 20001

and by mailing a copy, first class postage prepaid, to:

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Office of General Counsel
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William Morrow
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WMATC, Suite 703
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Leonard N. Bebchick